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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 75-83

THE UNIVERSITY OF CHICAGO AND ARGONNE,
A CORPORATION,
Petitioner,

vs.

LOUIS ALLEN McDANIEL, JR.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner, The University of Chicago and Argonne, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this case on March 14, 1975.

OPINIONS BELOW.

The opinion of the Court of Appeals and the denial of rehearing and rehearing *en banc* are reported at 512 F. 2d 583 and are reproduced herein as Appendices A and B, respectively. The Memorandum of Decision of the District Court is unreported, but is printed in its entirety as Appendix F hereto.

JURISDICTION.

The opinion and judgment of the Court of Appeals was entered on March 14, 1975.[1] A timely-filed petition for rehearing or for rehearing *en banc* was denied on April 15, 1975[2] On April 28, 1975, pursuant to Petitioner's motion, the Court of Appeals stayed the issuance of its mandate for a period of thirty days. Thereafter, on May 23, 1975, that stay order was extended to June 22, 1975,[3] and on June 25, 1975, the stay was further extended to and including July 14, 1975. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED.

Whether the Seventh Circuit, in reversing the judgment of the District Court, erred in holding that, in addition to the cause of action expressly provided by Section 3(b) of the Davis-Bacon Act, 40 U. S. C. § 276a-2(b), Section 1 of the Davis-Bacon Act, 40 U. S. C. § 276a, gives rise to an implied private right of action predicated upon federal jurisdiction under 28 U. S. C. § 1337.

1. The opinion and judgment of the Court of Appeals are printed as Appendix A hereto.

2. The order denying rehearing is printed as Appendix B hereto.

3. The orders staying issuance of the mandate are printed as Appendices C, D and E, hereto.

STATUTORY PROVISIONS INVOLVED.

Sections 1 and 3 of the Davis-Bacon Act, as amended (40 U. S. C. § 276a, *et seq.*), Section 1 of the Miller Act, as amended (40 U. S. C. § 270a, *et seq.*), and 28 U. S. C. § 1337 are applicable to this case and are reproduced verbatim as Appendix G hereto.

STATEMENT OF THE CASE.

This is an action to recover wages allegedly owing under the provisions of the Davis-Bacon Act to Respondent and a class he purports to represent. Respondent alleges that he was employed as a mechanic or laborer on a government construction project at the Argonne National Laboratory (Argonne) pursuant to a contract entered into between Argonne and the United States Atomic Energy Commission (AEC), now the United States Energy Resource Development Agency (ERDA), that the Davis-Bacon Act was applicable to the contract, and that Petitioner failed to pay him the prevailing wages to which he alleges the Secretary of Labor had determined he was entitled.[4] The action is alleged to arise "under one or more laws regulating Interstate Commerce," and Respondent claims that federal "jurisdiction of this action is predicated upon 28 United States Code, Sections 1331 and 1337, among others, and under the Davis-Bacon Act, Title 40 United States Code, Section 276a."[5]

Petitioner moved to dismiss, contending, *inter alia*, that the Davis-Bacon Act does not admit of a private right of action other than that expressly granted under Section 3(b) of the Act, 40 U. S. C. § 276a-2(b), which establishes a cause of action by an aggrieved employee against the contractor's bond under the Miller Act, 40 U. S. C. § 270b.

On March 12, 1973, the District Court for the Northern District of Illinois (Honorable Philip W. Tone) granted Petitioner's motion and dismissed the Complaint, ruling that Respondent had failed to state a cause of action upon which relief could be granted and that the Court's jurisdiction could not properly be

4. Complaint, Paras. II-IV.
5. Complaint, Para. I.

invoked under the Davis-Bacon Act.[6] In so ruling, the Court reasoned that the one right of action specifically provided under the Davis-Bacon Act was exclusive and that:

> "[T]here is no way to avoid the thrust of the statute's language and legislative history in delimiting the right of action to one which Congress felt would be adequate to protect employees whose contractors failed to pay them the wages prescribed by the statute."[7]

The Seventh Circuit reversed and remanded the case to the District Court for further proceedings. In an opinion by Chief Judge Thomas E. Fairchild, in which Circuit Judge Swygert and Circuit Judge Sprecher concurred, the Court reasoned that even though "the terms of § 276a-2(b) do not create a cause of action, cognizable in federal court, for one in (Respondent)'s position,"[8] other related statutes evidence congressional recognition that "wage earners have or may have rights of action under the contractual provisions required by § 276a which may be enforced in state court actions or federal court actions where jurisdiction is properly based."[9] Concluding that the remedial scheme expressly provided by Congress had "proved ineffective," the Court searched elsewhere for a jurisdictional predicate for Respondent's action.[10] Against this background, and spurred on by what it considered to be the mandate of this Court in *J. I. Case Company* v. *Borak*, 377 U. S. 426 (1964), and *Allen* v. *State Board of Elections*, 393 U. S. 544 (1969), the Seventh Circuit decided that a sufficient nexus exists between the Davis-Bacon Act and the commerce clause to found subject matter jurisdiction for this implied private right of action on 28 U. S. C. § 1337.[11]

6. App. F., p. A19.
7. App. F., p. A18.
8. App. A, p. A4.
9. App. A, p. A6.
10. App. A, pp. A6, A7.
11. App. A, pp. A7, A8.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI.

I.

THE PROPER CONSTRUCTION OF THE DAVIS-BACON ACT IS AN IMPORTANT FEDERAL QUESTION WHICH SHOULD BE PROMPTLY AND DEFINITIVELY RESOLVED BY THIS COURT.

A. The Decision of the Seventh Circuit Conflicts with Recent Decisions of This Court.

In its startling and unprecedented opinion below, the Seventh Circuit has ruled that, in addition to the cause of action expressly provided by Congress under Section 3(b) of the Davis-Bacon Act, Section 1 of the Act gives rise to an implied private right of action predicated upon federal jurisdiction under 28 U. S. C. § 1337. The Seventh Circuit reasoned that since the remedial scheme expressly provided by Congress had "proved ineffective," this Court's decisions in *J. I. Case* and *Allen, supra,* compelled the implication of a private right of action in federal district court to enforce rights under the Act. Recent decisions of this Court have wisely recognized that the judicial creation of a private right of action where none has been expressly provided by Congress should be carefully scrutinized and rejected where the balanced purpose of that statutory scheme would not be advanced by such a construction. *National Railroad Passenger Corporation* v. *National Association of Railroad Passengers,* 414 U. S. 453 (1974) (hereinafter *Amtrak*); *Securities Investor Protection Corporation* v. *Barbour,* ..... U. S. ....., 95 S. Ct. 1733 (1975) (hereinafter *SIPC*); *Cort* v. *Ash,* ..... U. S. ....., 43 LW 4773 (1975). In each of these cases this Court rejected the argument that implication of a private right of action in federal court was necessary to vindicate rights under the federal statute

in question. Furthermore, in each of these cases, this Court has carefully restricted the *J. I. Case-Allen* line of reasoning relied upon by the Seventh Circuit in its decision below.[12] Petitioner submits this Court's reasoning in *Amtrak* and *SIPC* is wholly applicable to the instant case and clearly reveals the error in the Seventh Circuit's reliance upon *J. I. Case* and *Allen.*

In *Amtrak,* this Court was faced with the question of whether the Rail Passenger Service Act of 1970 (Amtrak Act), 84 Stat. 1327, 45 U. S. C. § 501, *et seq.,* created an implied private right of action for the enforcement of duties and obligations imposed by the Amtrak Act. In holding that no such private right of action should be judicially created, this Court carefully reviewed the express language, legislative history and purposes of the Amtrak Act and determined that no such action was contemplated by Congress. Noting that Section 307(a) of the Amtrak Act specifically created a limited public cause of action, maintainable by the Attorney General, to enforce the duties and responsibilities imposed by the statute, this Court concluded that such a remedy is exclusive:

> "A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies. 'When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.' Botany Mills v. United States, 278 U.S. 282, 289 (1929). This principle of statutory construction reflects an ancient maxim—*expressio unius est exclusio alterius.* Since the Act creates a public cause of action for the enforcement of its provisions and a private cause of action only under very limited circumstances, this maxim would clearly compel the conclusion that the remedies created in § 307(a) are the exclusive means to enforce the duties and obligations imposed by the Act. . . ." 414 U. S. at 458.

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12. It should be noted that the opinion of the Seventh Circuit did not consider this Court's decision in *Amtrak.* Furthermore, since both *SIPC* and *Cort* were decided by this Court after the Seventh Circuit's opinion and denial of rehearing below, neither case could have been considered by the Seventh Circuit.

Virtually the identical reasoning is applicable herein since the Davis-Bacon Act also affords a public cause of action against a contractor's bond under limited circumstances.[13]

This Court next examined the legislative history of the Amtrak Act to determine whether the implication of a private right of action would be consistent with the intent of Congress. Observing that the original draft of the Amtrak Act, which was ultimately defeated, contained language specifically authorizing a private right of action to enforce the provisions of the Act, this Court concluded that judicial implication of such a right of action would clearly frustrate the intent of Congress.[14] Similarly, in the instant case, the Seventh Circuit's decision runs afoul of the clear intent of Congress, which considered and rejected a proposed amendment to the Davis-Bacon Act which would have expressly granted a private right of action to enforce provisions of the Act.[15]

Finally, this Court reviewed the overall purposes of the Amtrak Act and noted that permitting private lawsuits under the Act would undermine the fundamental objectives of that statutory program. This Court further concluded that the allowance of such a right of action would "completely undercut the efficient apparatus that Congress sought to provide" since "there would be a myriad of possible plaintiffs" and "the potential would exist for a barrage of lawsuits."[16]

The Seventh Circuit's opinion in the instant case failed to consider the impact of the implication of a private right of action on the overall purposes of the Davis-Bacon Act. It is submitted that the Seventh Circuit's opinion frustrates the clear congressional policy of ensuring the efficient administration of federally-funded Davis-Bacon Act projects.[17] In this regard, the

13. See Para. IIA, *infra*.
14. 414 U. S. at 461.
15. See Para. IIB, *infra*.
16. 414 U. S. at 463.
17. See Para. IIC, *infra*.

Seventh Circuit's decision herein does not square with this Court's reasoning in *Amtrak* and, accordingly, should be set aside.

This Court's decision in the *SIPC* case applied the *Amtrak* analysis to the question of whether customers of a broker-dealer have an implied private right of action under the Securities Investor Protection Act of 1970 (SIPA), 15 U. S. C. § 78aaa, *et seq.*, to compel the Securities Investor Protection Corporation to exercise its statutory authority for their benefit. In its decision issued on May 19, 1975 (after the Seventh Circuit's opinion and denial of rehearing in this case), this Court concluded that despite the broad remedial purpose of the SIPA to protect investors by providing "financial relief to the customers of failing broker-dealers with whom they had left cash or securities on deposit,"[18] it did not follow that the implied right of action sought was either necessary to or indeed capable of furthering that purpose."[19] The Court further noted that the allowance of the private right of action sought would have a disruptive effect on the securities market which the SIPA was designed to stabilize and, accordingly, the Court concluded:

> "These consequences are too grave, and when unnecessary, too inimical to the purposes of the Act, for the Court to impute to Congress an intent to grant to every member of the investing public control over their occurrence. . . ." ..... U. S. ....., 95 S. Ct. at 1740.

It is at precisely this point that the Seventh Circuit's logic in the opinion below falls short of the mark. Deliberating without the benefit of this Court's decision in *SIPC*, the Seventh Circuit held that an implied private right of action was necessary to ensure the payment of "prevailing" wages.[20] The Seventh Circuit

18. ..... U. S. ....., 95 S. Ct. at 1733.
19. ..... U. S. ....., 95 S. Ct. at 1739.
20. The Seventh Circuit cited *J. I. Case* and *Allen, supra,* as compelling the creation of an implied private right of action. For reasons virtually identical to those carefully identified by this Court in *SIPC, J. I. Case* and *Allen* are inapposite. ..... U. S. ....., 95

did not consider the effect the creation of such a private right of action would have on the carefully balanced program for administrative cost control of federally-funded contracts by contracting agencies. This correlative purpose of the Davis-Bacon Act has been recognized by this Court. *United States* v. *Joseph A. Holpuch Co.*, 328 U. S. 234, 239 (1946); *United States* v. *Blair*, 321 U. S. 730, 734 (1944). It is submitted that since the Seventh Circuit's decision allows circumvention of this control intended by Congress, the door has been opened for widely differing interpretations[21] as to Davis-Bacon Act coverage, classification and rates and the ultimate frustration of the central policy of the Act, the elimination of wage rates as a factor in bidding on certain types of government contracts. The implication of a private right of action which results in such interference with the central focus of the Act is clearly inconsistent with this Court's teaching in *Amtrak* and *SIPC*.

S. Ct. at 1740, 1741. Unlike the Securities Exchange Act of 1934 or the Voting Rights Act of 1965, the Davis-Bacon Act does not seek to establish federally actionable rights in a broad class of individuals and contains no general grant of jurisdiction to the district courts. Furthermore, the Davis-Bacon Act is not ambiguous; as properly noted by the Seventh Circuit, it creates only a limited action in the name of the United States on a contractor's bond (App. A, p. A5). Under such circumstances, no private right of action should be implied. *Calhoon* v. *Harvey*, 379 U. S. 134 (1964); *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U. S. 246 (1951); *B. F. Goodrich Company* v. *Northwest Industries, Inc.*, 424 F. 2d 1349 (3rd Cir. 1970), *cert. denied*, 400 U. S. 822; *Blaney* v. *Florida National Bank At Orlando*, 357 F. 2d 27 (5th Cir. 1966); *Noel Estate, Inc.* v. *Commercial National Bank In Shreveport*, 232 F. 2d 483 (5th Cir. 1956).

21. As this Court noted in *Amtrak*, *supra*, with the elimination of the "single forum" for resolution of such matters, and the substitution of "any and all district courts," the efficiency of any such system would be seriously eroded. 414 U. S. at 464.

B. The Proper Construction of the Davis-Bacon Act Will Be a Threshold Jurisdictional Issue in Other Federal Cases.

By virtue of the Seventh Circuit's decision, federal district courts are now, for the first time since the passage of the Davis-Bacon Act, available to private litigants for the filing of individual or class action suits under the Act. Having swept aside the administrative controls and procedures established under the Act, the Seventh Circuit has invited potential plaintiffs to proceed directly to federal court to resolve questions of coverage, classification and rates under the Act. It is submitted that the potential for a flood of federal court litigation flowing from this novel and wholly unprecedented interpretation of the Davis-Bacon Act is real.[22] Each such action will raise the threshold jurisdictional question of whether or not there is an implied private right of action in federal district court under the Davis-Bacon Act.

Petitioner submits that the proper interpretation of the Davis-Bacon Act is an important federal question which is now ripe for decision and which should be definitively resolved by this Court. Since the issue raised herein will be a threshold question in future federal district court cases which will be complex, time-consuming and expensive, the interests of judicial economy and fairness to all parties militate in favor of a prompt resolution of the issue by this Court.

22. Since the Seventh Circuit's opinion has only recently been published, its full impact in terms of new federal district court litigation has not yet been felt. However, one clear indication of the potential floodgate opened by the Seventh Circuit is the case of *Stanley E. Coutu* v. *Universities Research Association, Inc.*, Case No. 75 C 1129 (N. D. Ill.), which was filed on April 9, 1975, less than a month after the issuance of the Seventh Circuit's opinion herein. In that case, the plaintiff and a class he purports to represent seek to recover wages allegedly owing under the Davis-Bacon Act for work at Fermi National Accelerator Laboratory, another major research laboratory in the Chicago area. The complaint in that case is virtually identical to that filed herein. The defendant in that case has filed a motion to dismiss raising, *inter alia*, the identical issue presented herein.

II.

THE DECISION OF THE SEVENTH CIRCUIT SERIOUSLY MISCONSTRUES THE DAVIS-BACON ACT.

While normally, of course, error in the decision below is not alone sufficient reason for exercise of this Court's certiorari jurisdiction, there are situations in which granting the writ is an appropriate and necessary method of correcting a serious error, especially when that error threatens substantial interference with a major Congressional program or policy. *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U. S. 134, 136 (1968); *Williams* v. *Lee*, 358 U. S. 217, 218 (1959). Perhaps because it found the remedies expressly provided by Davis-Bacon "ineffective",[23] and further observed that the District Court had "reluctantly concluded"[24] that Respondent's action was not well-founded, the Seventh Circuit seriously misconstrued the plain language of Davis-Bacon and misinterpreted its legislative history, with the consequence that a major Congressional program will be subject to serious disruption if the decision below is allowed to stand.[25]

23. App. A, pp. A6, A7.

24. App. A, p. A4; App. F, p. A17.

25. If the Seventh Circuit had had the benefit of the guidance provided by this Court's decision in *SIPC*, it might have reached a different result. It is, of course, for this Court to decide whether the Seventh Circuit properly read *J. I. Case* and *Allen* as requiring the creation of a private right of action under these circumstances. Respondent submits that *SIPC* clearly indicates the Seventh Circuit erred in stretching the language of Davis-Bacon to provide direct recourse to the federal courts. The following analysis, sanctioned by this Court in *SIPC*, and reviewed with approval in *Cort*, presents compelling reasons for this Court to review the Seventh Circuit's opinion herein.

A. The Express Statutory Language Does Not Provide the Private Right of Action Created by the Seventh Circuit.

It is obvious and indisputable that the clear and unambiguous express language of Section 1 of the Davis-Bacon Act does not provide a private right of action in federal district court.[26] Section 1 of the Act merely sets forth the requisite standards to which certain federal contracts must adhere.[27] Section 1 contains no jurisdictional grant and creates no cause of action whatsoever. With the exception of the limited right of action afforded by Section 3(b), 40 U. S. C. § 276a-2(b), no other provision of the Davis-Bacon Act expressly creates a private right of action.[28]

The Seventh Circuit's analysis of the limited cause of action specifically provided in Section 3(b) of the Act is basically sound. The Court's opinion carefully reviews and analyzes the legislative history of the related statutes in question[29] and rightly concludes that Section 3(b) of the Act creates only a limited right of action on the bond:

> "We do not read the Portal to Portal provisions with respect to actions under the Davis-Bacon Act as congressional recognition of conferral by § 276a-2(b) of a right of action other than on the bond."[30]

Nor does Petitioner have any quarrel whatsoever with the Court's further conclusion that § 3(b) of the Act does not "create a cause of action, cognizable in federal court, for one in plaintiff's position."[31]

26. The Seventh Circuit accurately paraphrased the *express* provisions of Section 1 of the Act, 40 U. S. C. § 276a (App. A, pp. A1-A3).

27. App. G, pp. A20-A22.

28. 40 U. S. C. §§ 276a-276a-5.

29. Davis-Bacon Act, 40 U. S. C. § 276a, *et seq.;* Miller Act, 40 U. S. C. § 270a, *et seq.;* and Portal-to-Portal Act, 29 U. S. C. § 255, *et seq.*

30. App. A, p. A6.

31. App. A, p. A4.

Petitioner does, however, respectfully contest the Seventh Circuit's misguided notion that aggrieved individuals "have or may have"[32] private rights of action springing from § 1 of the Act. Petitioner submits that, by the well established principle of *expressio unius est exclusio alterius*, the plain words of the statute preclude such an inference. Where Congress has expressly provided a particular way of redressing violations of a Congressional enactment, other methods are not to be inferred.[33]

The Seventh Circuit's opinion deprecates the weight to be accorded this principle in construing the words chosen by Congress to carry out its legislative intent. But, while any rule of statutory construction can undoubtedly be overridden in particular circumstances, general guidelines of this character play a necessary role in construing statutes,[34] and should not be ignored unless there is definite indication of a contrary legislative intent. In the present case, the legislative history compels the conclusion that Congress meant exactly what it said.

B. The Legislative History of the Davis-Bacon Act Clearly Indicates That Congress Did Not Intend to Provide the Private Right of Action Created by the Seventh Circuit.

Since the Davis-Bacon Act provides no express private right of action, we must turn to the leigslative history to determine

32. App. A, p. A6.

33. *See, e.g., Calhoon* v. *Harvey, supra; Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co., supra; Blaney* v. *Florida National Bank at Orlando, supra; Powell* v. *Washington Post Company*, 267 F. 2d 651 (D. C. Cir. 1959), *cert. denied*, 360 U. S. 930.

34. The effect of specific designation of a remedy has long been recognized by this Court. *See*, for example, *Switchmen's Union of North America* v. *National Mediation Board*, 320 U. S. 297, 301 (1943): "All constitutional questions aside, it is for Congress to determine how the rights which it creates shall be enforced. . . . In such a case the specification of one remedy normally excludes another." *See also Fleischmann Distilling Corporation* v. *Maier Brewing Co.*, 386 U. S. 714, 720 (1967): "When a cause of action has been created by a statute which expressly provides the remedies for vindication of the cause, other remedies should not readily be implied."

whether the inference of such a private right of action is "consistent with the evident legislative intent."[35] It is respectfully submitted that the inference of such a private right of action by the Seventh Circuit is wholly inconsistent with the legislative history of the Davis-Bacon Act and, more specifically, amendments to its enforcement provisions. Indeed, a proposed amendment, specifically ***rejected*** by the Congress, would have changed the Davis-Bacon Act to expressly provide the very right of action judicially created below by the Seventh Circuit. Under such circumstances, the Seventh Circuit has clearly transgressed Congressional intent that no such right of action be permitted under the Act.

The original Davis-Bacon Act, enacted by Congress in 1931, provided that the wages paid on certain federal construction projects "shall not be less than the prevailing rate of wages."[36] As initially enacted, the statute contained only limited provisions relating to wage determinations, and provided no enforcement procedures. In 1932, Congress passed an amendment to the Act providing for the imposition of fines and deductions on any contractor violating the Act,[37] however, the proposed amendment was vetoed by President Hoover.[38] Subsequently, in 1935, Congress amended the Act to incorporate provisions for administrative predetermination of wages and for enforcement that remain unchanged today.[39] Specifically, the 1935 statute amended the original Act to provide a new Section 2, permitting the government to cancel contracts for non-compliance with the Act,[40] a new Section 3(a), authorizing the Comptroller General to withhold payments to contractors,[41] and a new Section 3(b),

35. *Amtrak, supra*, 414 U. S. at 458; *SIPC, supra*, ... U. S. ....., 95 S. Ct. at 1737.

36. Davis-Bacon Act of 1931, Chap. 411, § 1, 46 Stat. 1494.

37. S. 3847, 71st Cong. (1932).

38. See Veto Message (S. Doc. No. 134) (1932).

39. 40 U. S. C. §§ 276a-276a-2(b).

40. 40 U. S. C. § 276a-1.

41. 40 U. S. C. § 276a-2(a).

granting laborers and mechanics a limited right to sue in federal court to recover wages against the Miller Act bond.[42] Congress has not changed these basic provisions of the Davis-Bacon Act.

Although no substantive amendment to these provisions has been enacted, Congress has had the opportunity to review and debate proposed legislation which would have dramatically changed the Act. Specifically, in 1962 and 1963, the House Special Subcommittee on Labor held extensive hearings on various proposed amendments to the Davis-Bacon Act.[43] Among the legislative measures considered by the Subcommittee and the Congress were two bills[44] sponsored by Congressman Charles E. Goodell of New York, which would have amended the Davis-Bacon Act to provide extensive judicial review of administrative wage determinations and to provide a private right of action in federal court to enforce the Act.

H. R. 9590, proposed by Congressman Goodell, would have amended the Davis-Bacon Act to provide as follows:

> "Sec. 7. (a) *Whenever it is claimed that any contractor or subcontractor has refused or failed to pay the wages that he is required to pay by reason of a wage determination issued* by the Secretary of Labor [under the Davis-Bacon Act] to employees . . . the contracting agency shall investigate the claim . . . and . . . shall either deny or sustain such claim . . .
>
> * * * * *
>
> "(c) *Any employee aggrieved or adversely affected by any ruling made pursuant to subsection (a) of this section may bring an action in the United States district court* . . . against the contractor . . . to recover the amount of unpaid wages due under this Act. . . .

42. 40 U. S. C. § 276a-2(b).

43. Hearings Before the Special Subcommittee on Labor of the House Committee on Education and Labor, 87th Cong., 2nd Sess. (1962).

44. H. R. 11115, 87th Cong., 2nd Sess. (1962), and an amended version H. R. 9590, 88th Cong., 2nd Sess. (1964).

> "(d) In any action brought pursuant to subsection (b) or (c) of this section, the court shall have authority to determine the obligations of the contractor or subcontractor under the wage provisions of his contract, and whether or not the contractor or subcontractor has failed to comply with them. . . ." (Emphasis added.)[45]

Additionally, H. R. 9590 would have further amended the Act by adding a new Section 8 to provide for judicial review of wage determinations as follows:

> "Sec. 8. (a) *Any person aggrieved* by a wage determination for laborers or mechanics issued pursuant to this Act . . . may obtain *judicial review* of such determination in an action against the Secretary of Labor and the contracting agency in a district court of the United States.
>
> * * * * *
>
> "(e) *At the conclusion of any hearing on the merits, the court shall, in any case in which it finds that the prevailing wage originally promulgated was not determined in accordance with law, establish such prevailing wage as it deems to be in accordance with law.*" (Emphasis added.)[46]

If the plain language of these proposed amendments is not sufficiently clear, certainly Congressman Goodell's explanation of its intended purpose during debate on the House floor, should leave no doubt as to its intended meaning:

> "The judicial review section which I am offering permits an aggrieved individual who feels that the determination of the Secretary of Labor is erroneous to bring an action in federal court. . . ."[47]

The fact that these proposed amendments were rejected by the Congress is compelling evidence that the Seventh Circuit has erred. However, even more instructive is the wealth of comment and debate over these amendments which should leave absolutely

45. H. R. 9590, 88th Cong., 2nd Sess., §§ 7(a), (c) and (d) (1964).

46. H. R. 9590, 88th Cong., 2nd Sess., §§ 8(a) and (e) (1964).

47. 88 Cong. Rec. 1227 (1964) (remarks by Congressman Goodell).

no doubt as to the intent of Congress with respect to judicial relief.

At the conclusion of the extensive hearings into the various amendments proposed, the House Committee on Education and Labor, through its Chairman Adam C. Powell of New York, issued a report favoring an amendment to add fringe benefits to Davis-Bacon Act determinations,[48] but rejecting the concept of judicial review as embodied in the Goodell bill. In recommending that the House reject amendments adding judicial review to the Act, the majority report observed that:

> "[J]udicial review of wage determinations under the Davis-Bacon Act is *simply not practicable* and, in fact, could *frustrate the entire program.*" (Emphasis added.)[49]

The majority report went on to note that some form of review of wage determinations should be provided, however, it concluded that "administrative improvements rather than a legislative solution provide the best approach."[50] The majority report then observed that the Secretary of Labor had recently established a Wage Appeals Board having jurisdiction over "all significant questions under these labor standard statutes" and concluded:

> "The Committee is confident that this Board offers the necessary procedural protections for interested parties, *without impeding the operation of our construction programs.*" (Emphasis added.)[51]

Finally, and most significantly, the majority report commented on the authority of the Wage Appeals Board in enforcement matters and concluded that enforcement should be left to administrative proceedings:

> "In enforcement cases, the Board is empowered to review potential debarment cases on the record after full opportunity to be heard has been extended to any contractor or subcontractor. The committee believes that *the effectiveness and adequacy of this administrative approach should be thoroughly tested before consideration is given to other measures.*" (Emphasis added.)[52]

48. H. R. 6041, 88th Cong., 1st Sess. (1963).
49. H. R. Rep. No. 308, 88th Cong., 1st Sess., p. 4 (1964).
50. *Ibid.*
51. *Ibid.*

From these comments on the proposed amendments, it is abundantly clear that the majority of the Committee, whose views were ultimately ratified by the House, considered the creation of judicial review inimical to the various interests promoted under the Act. Furthermore, it is equally clear from the acrimonious comments contained in the minority views, in which Congressman Goodell joined, that no provision of the Davis-Bacon Act provided for the recourse to the courts envisioned by the amendments proposed:

> "At the present time, every finding of the Secretary of Labor, with or without an investigation and with or without a hearing, is final. Neither employees or employers have any recourse except to beg the Secretary for mercy, or perhaps prevail upon their Congressman to intervene. It is an intolerable situation for such arbitrary and final authority to be lodged in a single administrator."[53]

This minority view added the cryptic warning that, "If fringe benefits [H. R. 6041] are approved by the Congress as separate legislation, the opportunity for real reform will then be lost."[54] The minority view did not prevail.

When these amendments were reported out of committee and proceeded to the House floor for debate, Congressman Goodell and his colleagues once again attempted to secure the broad recourse to the courts by amendment to the Davis-Bacon Act. The debate on the House floor preceding the defeat of Congressman Goodell's proposed amendments[55] reveals that Congress

52. H. R. Rep. No. 308, 88th Cong., 1st Sess., p. 5 (1964).
53. H. R. Rep. No. 308, 88th Cong., 1st Sess., p. 29 (1964).
54. H. R. Rep. No. 308, 88th Cong., 1st Sess., p. 30 (1964).
55. 88 Cong. Rec. 1201-1231 (1964).

intended to provide no such recourse to the courts. In this regard, Congressman Fogarty argued as follows:

> "What will the Goodell amendment do? This is what it will do. It will allow any contractor or subcontractor, bidder or prospective bidder, employee or prospective employee and so far as the bill is concerned, almost anyone who regards himself adversely affected by the Secretary's wage determinations to go into court and stop that project cold . . . .
>
> "This phrase 'judicial review' is an appealing concept, but it is not practical. Its purpose is to try to drive a wedge into the effective operation of the Davis-Bacon Act which has been in existence for the past 30-some years."[56]

The Goodell bill was defeated. In the words of the minority report, the "opportunity for real reform" was lost. But, nonetheless, Congress had spoken and spoken unequivocally with respect to the proposed recourse to the courts, both for judicial review of wage determinations and for enforcement of the Act. Congress viewed the administrative procedures then available as entirely adequate. Congress has spoken no differently in this regard since 1964. The intent of Congress could hardly be more clear.

Tracing the course of this legislative history of the Act clearly reveals that the implication of a private right of action is wholly inconsistent with the intent of Congress. The mere fact that Congressman Goodell proposed legislation to create such a private right of action is a clear indication that none then existed. Indeed, the minority report argued strenuously (to no avail) for the passage of such a bill because in their view no such right of action then existed. And finally, after extensive committee hearings and reasoned debate, Congress specifically rejected the precise private right of action which the Seventh Circuit has fabricated.[57] Application of fundamental principles

56. 88 Cong. Rec. 1201.

57. It is noteworthy that the Seventh Circuit has created this right of action, not out of statutory ambiguity, and not out of legislative silence, but rather, the Court has acted in the face of and contrary to a clear and compelling Congressional voice.

of the separation of powers yields the unavoidable conclusion that provisions of the Act which Congress has expressly refused to change by legislative processes should not be amended by the courts.

C. The General Structure and Purpose of the Davis-Bacon Act Will Be Frustrated by the Implied Private Right of Action Created by the Seventh Circuit.

The Seventh Circuit's decision, which affords a direct private right of action in federal district court for alleged violations of the Davis-Bacon Act, sweeps aside the comprehensive administrative control of the Act intended by Congress. In implying a direct cause of action under Section 1 of the Act, 40 U. S. C. § 276a, the Seventh Circuit failed to consider the far-reaching implications of its decision on the administration of federally funded construction contracts. The practical consequences of this decision will frustrate the general structure and purpose of the Davis-Bacon Act.[58]

The basic flaw in the rationale of the Seventh Circuit's opinion is its conclusion that the sole Congressional purpose of the Davis-Bacon Act is "insuring the payment of 'prevailing' wages."[59] In order to effectuate that purpose, the Seventh Circuit concluded that implication of a private right of action was necessary, despite the fact that none was provided by Congress. However, it has long been recognized that the Act has several related purposes, only one of which is the "prevailing wage" standard.

58. In failing to consider the practical effect of creating this private right of action, the Seventh Circuit disregarded the case of *Hewitt Robins, Incorporated* v. *Eastern Freight-Ways, Inc.*, 371 U. S. 84 (1962), where this Court concluded that "the allowance of a judicial remedy would result in undercutting the stability of the wage structure which the statutory procedures sought to insure." 371 U. S. at p. 87.

59. App. A, p. A6.

The legislative history of the Act makes it clear that one of the important purposes of the entire statutory scheme is the maintenance of administrative controls over federally-funded construction projects and the elimination of wage rates as a factor in bidding on government contracts. The majority report of the House Committee on Education and Labor, in commenting on proposed amendments to the Davis-Bacon Act, clearly perceived the serious practical consequences that would be entailed in permitting wholesale recourse to the courts to redress grievances arising under the Act. The majority report reasoned that the grant of judicial review was "simply not practicable" and stated that it "could frustrate the entire program."[60] The report went on to recommend "administrative improvements" rather than legislation of a judicial remedy because of the dire consequences visualized in the latter approach:

> "It could reasonably be anticipated that a flood of litigation would ensue which would be comparable in magnitude to the wave of wage-hour cases which inundated the courts some years ago and resulted in enactment of the Portal-to-Portal Act. The construction of vital defense installations and other important construction activity would be seriously delayed while court proceedings are exhausted. Also, the contested wage determination would probably be out of date by the time the court's ruling is handed down. A new determination would be required, and the whole process might well be repeated."[61]

The Committee Report clearly envisioned the possibility that changed circumstances could warrant legislative change from a purely administrative review system to one involving judicial recourse. However, the Committee urged that "the effectiveness and adequacy of this administrative approach should be thoroughly tested before consideration is given to other measures."[62]

60. H. R. Rep. No. 308, 88th Cong., 1st Sess., p. 4 (1964).

61. *Ibid.*

62. H. R. Rep. No. 308, 88th Cong., 1st Sess., p. 5 (1964).

Clearly, the Committee visualized that such "other measures," if necessary, would be conceived and deliberated by the Congress, not the courts. Petitioner submits that, if the Davis-Bacon Act is to be amended as comprehensively as the Seventh Circuit has opined, the proper forum for such changes is in the Congress, where all competing policy considerations can be more fully ventilated through extensive committee hearings and reasoned debate. The courts are not the proper place for such detailed examination of public policy.

CONCLUSION.

The interpretation of the Davis-Bacon Act which the Seventh Circuit has adopted does not square with the plain language of the statute, its legislative history, or a proper conception of the purpose and general structure of the Act. It is submitted that the Seventh Circuit's decision totally emasculates a key part of this entire statutory scheme and, accordingly, threatens to disturb the delicate balance of competing policy considerations carefully weighed by Congress. The issue presented is a pure question of statutory interpretation bearing upon the threshold question of federal district court jurisdiction under the Act. It is an issue which does not require further consideration and refinement by lower courts prior to disposition by this Court. It is and will be a threshold jurisdictional question in pending and anticipated federal cases which, if allowed to proceed on their merits, will be complex, time-consuming and expensive. The decision of the Seventh Circuit is an appropriate vehicle for exercise of this Court's jurisdiction because that decision not only presents a fundamental question of statutory construction, but also has created a serious impediment to the continued implementation of the central policy of the Act, the elimination of wage rates as a factor in bidding on government contracts.

For all of the foregoing reasons, Petitioner prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit in this case.

Respectfully submitted,

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APPENDIX A.

IN THE UNITED STATES COURT OF APPEALS,
For the Seventh Circuit,
512 F. 2d 583 (1975).

No. 73-1438

LOUIS ALLEN MCDANIEL, JR.,
Plaintiff-Appellant,

vs.

THE UNIVERSITY OF CHICAGO AND ARGONNE, a corporation,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division—No. 72 C 270
PHILIP W. TONE, *Judge.*

Argued April 11, 1974—Decided March 14, 1975

Before FAIRCHILD, *Chief Judge*, and SWYGERT and SPRECHER, *Circuit Judges.*

FAIRCHILD, *Chief Judge.* Plaintiff McDaniel has appealed from a judgment dismissing his complaint in a class action against the University of Chicago.

The University had a contract with the United States for construction or alteration of Argonne National Laboratory. There is no question but that this government contract was subject to the provisions of the Davis-Bacon Act. Accordingly 40 U. S. C. § 276a required the specifications to "contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevail-

ing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work" in the place of performance, and required any contract based on the specifications to contain certain stipulations concerning payment of mechanics and laborers by the contractor or subcontractor.

Plaintiffs claimed that they were employed pursuant to the contract, but were paid at rates substantially lower than the determined prevailing wages. The complaint purported to state five causes of action. The first was apparently based on the theory that a cause of action against the contractor is conferred by 40 U. S. C. § 276a-2(b) or should be implied from § 276a, and the second on the theory that the contract had been breached. Jurisdiction was predicated on 28 U. S. C. § 1331 (federal question) and § 1337 (action arising under Act regulating commerce). Three other causes of action suggest common law theories and pendent jurisdiction was claimed.

The same facts which subject the University's contract with the United States to the Davis-Bacon Act, 40 U. S. C. §§ 276a to 276a-7, also make it subject to the Miller Act, 40 U. S. C. §§ 270a-270e. Section 270a requires that before such a contract is awarded, the contractor shall furnish, in addition to a performance bond, "A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person."

Section 270b provides that "Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a . . . and who has not been paid in full therefore [within a specified period] shall have the right to sue on such payment bond . . ." subject to specified conditions, including a limitation of jurisdiction of such action to the federal district court for the place of performance of the contract and prohibition of commencement after one year.

Turning to the Davis-Bacon Act, § 276a requires that the contract authorize withholding by the government of accrued payments to the extent considered necessary to pay laborers and mechanics the difference between the rates of wages required and the rates of wages received. Section 276a-2(a) authorizes direct payment of sums due to laborers and mechanics from sums withheld. It is undisputed, however, that no money was withheld in this instance.

Section 276a-2(b) provides:

> "If the accrued payments withheld under the terms of the contract, as aforesaid, are insufficient to reimburse all the laborers and mechanics, with respect to whom there has been a failure to pay the wages required pursuant to sections 176a to 276a-5 of this title, such laborers and mechanics *shall have the right of action and/or of intervention against the contractor and his sureties conferred by law upon persons furnishing labor or materials,* and in such proceedings it shall be no defense that such laborers and mechanics accepted or agreed to accept less than the required rate of wages or voluntarily made refunds." (Italics ours.)

Clearly plaintiff and members of the class could have brought action under § 270b(a) within one year if a bond had been furnished. It is undisputed, however, that the University did not furnish a bond. Section 270e authorizes waiver of §§ 270a-270d as to certain types of projects. No claim has been made that waiver was unauthorized in the instant case and, indeed, the complaint, as distinguished from the brief on appeal, does not suggest that the claims are founded upon the University's failure to provide a bond.[1]

1. The Heard Act, predecessor to the Miller Act, was consistently interpreted as providing a cause of action and federal subject matter jurisdiction only when there was a bond extant which expressly included the obligation to "make payments to all persons supplying . . . labor or materials in the prosecution of the work provided for" in the government contract. The underlying statutory requirement to execute such a bond was not deemed sufficient to provide a federal action. See, *e.g., United States for the use of National Regu-*

Thus plaintiff and members of the class (assuming as claimed that they were paid less than properly determined prevailing wages) have available to them neither direct payment by the government out of amounts withheld, nor an action on a Miller Act bond, the two remedies clearly contemplated by Congress.

The district court reluctantly concluded that the Davis-Bacon Act did not confer a right of action against the contractor, cognizable in federal court, under the circumstances alleged in the complaint. The language we have italicized above in § 276a-2(b) was deemed no more than a reference to the right of action on the Miller Act bond, set forth in § 270b.

We have no difficulty in agreeing that the terms of § 276a-2(b) do not create a cause of action, cognizable in federal court, for one in plaintiff's position.

For many years, beginning in 1894, the Heard Act required that the bond filed by certain government contractors include the obligation to "make payments to all persons supplying him or them labor and materials in the prosecution of the work provided for in such contract" and that upon the bond "said person or persons supplying such labor and materials shall have a right of action . . ." 28 Stats. 278.

In 1931, Congress enacted the provision of the Davis-Bacon Act which required the contract to provide "that the rate of wages for all laborers and mechanics employed by the contractor or any subcontractor in the public buildings covered by the contract shall be not less than the prevailing rate of wages for work of similar nature" in the locality. 46 Stat. 1494. No remedy

lator Co. v. *Montgomery Heating & Ventilating Co., et al.*, 255 F. 2d 683, 684 (5th Cir. 1919); *United States for the use of Felix Zambetti* v. *American Fence Co.*, 15 F. 2d 449 (S. D. N. Y. 1925), aff'd 15 F. 2d 450 (2nd Cir. 1926); *Strong* v. *American Fence Const. Co.*, 245 N. Y. 48, 156 N. E. 92, 93 (1927). The Miller Act has been similarly construed as not providing a federal cause of action for failure to provide a bond. *Cf. Harry F. Ortlip Co. of Pennsylvania* v. *Alvey Ferguson Co.*, 223 F. Supp. 893, 894 (E. D. Pa. 1963); *Gallagher & Speck, Inc.* v. *Ford Motor Co.*, 226 F. 2d 728, 731 (7th Cir. 1955).

was expressly provided, although it might well be supposed that an underpaid person might have a cause of action as a third-party beneficiary of the contract, particularly since the provision was required by law for his protection.

In 1935, two changes took place. On August 24, the Miller Act replaced the Heard Act, 49 Stat. 793, and on August 30, the Davis-Bacon Act was amended by inserting, among other things, the remedy provisions substantially in their present form. 49 Stat. 1011. Although the Miller Act preceded the Davis-Bacon amendments in enactment by six days, the Heard Act was in effect while the amendments were being drafted.

The language of the statutes, and the sequence of enactment referred to, make it clear that "the right of action" referred to in § 276a-2(b) meant, when drafted, the "right of action" on the bond conferred on persons supplying labor and materials by the Heard Act, and supplanted by "the right to sue on such payment bond" conferred on such persons by the Miller Act, § 270b(a).

This meaning was specified in the Senate Report accompanying the 1935 bill, as follows:

> "Section 3(b) [§ 276a-2(b)]: When the funds withheld for such claimants are insufficient to reimburse all laborers and mechanics aggrieved by breach of the wage stipulations, this subsection gives such laborers and mechanics a cause of action on the contractor's bond, pursuant to the provisions of the Hurd [Heard] Act as amended from time to time (act of Aug. 13, 1894, 28 Stat. 278, U. S. C. title 40, sec. 230)." Sen. Rep. No. 1155, 74th Cong., 1st Sess., 4 (1935). See remarks of Senator Walsh to the same effect, 79 Cong. Rec. 12073 (July 30, 1935).

Numerous provisions with respect to Portal to Portal Pay, 29 U. S. C. §§ 251-262, refer to liability or actions to recover minimum wages under the Davis-Bacon Act, as well as similar actions under the Fair Labor Standards Act of 1938 and the

Walsh-Healey Act. Plaintiff refers particularly to § 255(a) which imposes a two year statute of limitations on such actions. Pointing out that 40 U. S. C. § 270b(b) prohibits a suit on the bond under the Miller Act after one year after the last performance of labor, plaintiff argues that the Davis-Bacon Act must contemplate a private right of action different from the right to sue on this bond. We do not read the Portal to Portal provisions with respect to actions under the Davis-Bacon Act as congressional recognition of conferral by § 276a-2(b) of a right of action other than on the bond. We do conclude, however, that it may well be recognition that wage-earners have or may have rights of action under the contractual provisions required by § 276a which may be enforced in state court actions or federal court actions where jurisdiction is properly based.[2]

Such a right of action is consistent with the congressional purpose in the Davis-Bacon Act: insuring the payment of "prevailing" wages to laborers and mechanics on all government contracts in excess of $2000. In a case in which the express remedies provided to fulfil this purpose, e.g., the withholding of accrued payments due the contractor by the government for direct payment to underpaid laborers and mechanics (40 U. S. C. § 276a(a)) and a suit on the required Miller Act payment bond (40 U. S. C. § 270b(a)), have proved ineffec-

2. The Miller Act's grant of subject matter jurisdiction, while underlying the right of action referred to in 40 U. S. C. § 276a-2(b) (Davis-Bacon), is "inseparably linked" to the statutory remedy of an action on the payment bond and thus cannot provide jurisdiction over a cause of action arising from the contractual commitment to pay "prevailing" wages imposed by § 276a(a). The Miller Act requirements that suit be brought in the name of the United States for the use of the person suing, that venue be limited to the district in which the contract was to be performed or executed, and the narrow one year limitation period are clearly designed to facilitate the orderly and equitable disposition of all competing rights in the bond and reenforce the conclusion that Miller Act subject matter jurisdiction is limited to suits on the bond. See *United States* v. *Illinois Surety Co.*, 253 Pa. 557, 98 A. 730 (1916); *Strong* v. *American Fence Co.*, 245 N. Y. 48, 156 N. E. 92 (1927); and note 1, *supra*, and cases cited therein.

tive, we should be especially "alert to provide such remedies as are necessary to make effective the congressional purpose." *J. I. Case* v. *Borak*, 377 U. S. 426, 433 (1964).[3]

Plaintiff alleges that jurisdiction is predicated upon 28 U. S. C. § 1337 which provides in pertinent part:

> "The district courts shall have original jurisdiction of any civicl actions . . . arising under any Act of Congress regulating commerce."

The scope of jurisdiction granted by this provision has been broadly construed. In *Murphy* v. *Colonial Federal Savings and Loan Ass'n*, 388 F. 2d 609, 614-15 (2nd Cir. 1967), the court, Judge Friendly writing, held that the provision encompassed any actions arising under "all acts whose constitutional basis is the commerce clause" and that "to found jurisdiction upon § 1337, it is not requisite that the commerce clause be the exclusive source of Federal power; it suffices that it be a significant one." See also, *Imm* v. *Union R. R.*, 389 F. 2d 858, 860 (3rd Cir. 1961), *cert. denied*, 368 U. S. 833; *Sosa* v. *Fite*, 465 F. 2d 1227 (5th Cir. 1972); *Moreno* v. *United States Dep't of Agriculture*, 345 F. Supp. 310, 312-13 (D. D. C. 1972), aff'd 413 U. S. 528 (1973); C. Wright, *Law of Federal Courts* (2nd ed. 1970) at p. 109 and cases cited in note 33.

We conclude that the commerce clause constitutes a significant constitutional basis underlying the Davis-Bacon Act's validity. The requirement that all specified government construction contracts, contain an express commitment to pay local "prevailing" wage rates as determined (in case of dispute) by the Secretary of Labor was first enacted in 1931, c. 411, § 1, 46 Stat. 1494. The committee report, Sen. Rep. No. 1494, 71st Cong., 3rd Sess. (1931), makes clear that the Act was designed to "provide a more equable distribution of employ-

3. Where the express remedies provided depend, as here, on governmental enforcement (of both the withholding provision and the bond requirement), "the guarantee [of "prevailing" wages] . . . might well prove an empty promise unless the private citizen were allowed to seek judicial enforcement. . . ." *Allen* v. *State Board of Elections*, 393 U. S. 545, 557 (1968).

ment . . . and [to] generally benefit the country at large" by preventing government contractors from importing migratory labor at substantially less than prevailing wages. The country was then in the midst of a serious economic depression and government construction projects were considered an important element of recovery through the employment opportunities they provided. One basic premise of this legislation was to foster economic stability throughout the nation by requiring that those employed on federal projects receive fair and equitable wages. While Congress (possibly because of narrow views of federal jurisdiction then widely held) elected to limit its attention to federal construction projects, and other constitutional provisions doubtless exist which provide additional bases of legislative power, we think a sufficient nexus exists with the commerce clause to found jurisdiction upon § 1337.[4]

We therefore conclude that plaintiff's complaint, in that it sought to enforce defendant's contractual commitment to pay "prevailing" wages as determined by the Secretary of Labor, stated a cause of action under the Davis-Bacon Act for which relief could be granted and that subject matter jurisdiction was properly based upon 28 U. S. C. § 1337.[5] Once the district court had jurisdiction over this cause of action, it also had pendent jurisdiction to decide the state claims, arising out of

4. The Fair Labor Standards Act of 1938, 29 U. S. C. § 201 *et seq.*, reflecting a similar intent to forbid the payment of sub-standard wages, *cf.* 29 U. S. C. § 202(a), imposed a minimum wage requirement upon employers and was held to constitute a proper legislative utilization of the commerce power. *United States* v. *Darby,* 312 U. S. 100, 117-124 (1941).

5. It is also alleged that jurisdiction is predicated upon 28 U. S. C. § 1331. Not only must the matter in controversy arise under federal law, but must exceed $10,000. The complaint indicates only that the accumulated claims of members of the class exceed that amount. Such cumulation does not suffice either in diversity or federal question cases. *Snyder* v. *Harris,* 394 U. S. 332 (1969); *Zahn* v. *International Paper Co.,* 414 U. S. 291 (1973); *National Treasury Employees Union* v. *Nixon,* 492 F. 2d 587, 592 (D. C. Cir. 1974).

the same facts, which were asserted in counts 3 through 5. *United Mine Workers* v. *Gibbs,* 383 U. S. 715 (1966).

Accordingly, the judgment dismissing the complaint is reversed and the cause is remanded for further proceedings consistent with this opinion.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS,
For the Seventh Circuit,
Chicago, Illinois 60604.

March 14, 1975.
Before
HON. THOMAS E. FAIRCHILD, *Chief Judge,*
HON. LUTHER M. SWYGERT, *Circuit Judge,*
HON. ROBERT A. SPRECHER, *Circuit Judge.*

LOUIS ALLEN MCDANIEL, JR.,
Plaintiff-Appellant,
No. 73-1438 *vs.*
THE UNIVERSITY OF CHICAGO and ARGONNE, a corporation,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Reversed and Remanded, with costs, in accordance the opinion of this court as of this date.

APPENDIX B.

UNITED STATES COURT OF APPEALS,
For the Seventh Circuit,
Chicago, Illinois 60604.

April 15, 1975.
Before
HON. THOMAS E. FAIRCHILD, *Chief Judge,*
HON. LUTHER M. SWYGERT, *Circuit Judge,*
HON. ROBERT A. SPRECHER, *Circuit Judge.*

LOUIS ALLEN MCDANIEL, JR.,
Plaintiff-Appellant,
No. 73-1438 *vs.*
UNIVERSITY OF CHICAGO and ARGONNE, a corp.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
(72 C 270)

On consideration of the petition for rehearing and suggestion that it be reheard *en banc* filed in the above-entitled cause, no judge in active service having requested a vote thereon, nor any judge having voted to grant the suggestion, and all of members of the panel having voted to deny a rehearing.

IT IS ORDERED that the petition for a rehearing in the above-entitled cause be, and the same is hereby, Denied.

Note: Judge Tone disqualified himself and took no active part in the vote.

APPENDIX C.

UNITED STATES COURT OF APPEALS,
For the Seventh Circuit,
Chicago, Illinois 60604.

April 28, 1975.
Before
HON. THOMAS E. FAIRCHILD, *Chief Judge*.

LOUIS ALLEN MCDANIEL, JR., *Plaintiff-Appellant,* vs. UNIVERSITY OF CHICAGO and ARGONNE, a corp., *Defendants-Appellees.* No. 73-1438	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. (72 C 270)

On consideration of the motion of counsel for the defendants-appellees for a stay of this Court's mandate, the certificate of counsel in compliance with Circuit Rule 21, having been filed therewith,

IT IS ORDERED that the mandate of this Court be stayed for a period of thirty (30) days pursuant to the provisions of Rule 41(b) of the Federal Rules of Appellate Procedure.

APPENDIX D.

UNITED STATES COURT OF APPEALS,
For the Seventh Circuit,
Chicago, Illinois 60604.

May 23, 1975.
Before
HON. THOMAS E. FAIRCHILD, *Chief Judge*.

LOUIS ALLEN MCDANIEL, JR., *Plaintiff-Appellant,* vs. UNIVERSITY OF CHICAGO and ARGONNE, a corporation, *Defendants-Appellees.* No. 73-1438	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. (72 C 270)

On consideration of the motion of counsel for defendants-appellees for a further stay of the mandate of this Court pending the filing of a petition for certiorari to the Supreme Court of the United States,

IT IS ORDERED that said motion be, and the same is hereby, Granted and the mandate of this Court is stayed up to and including June 22, 1975.

APPENDIX E.

UNITED STATES COURT OF APPEALS,
For the Seventh Circuit,
Chicago, Illinois 60604.

June 25, 1975.
Before
HON. THOMAS E. FAIRCHILD, *Chief Judge.*

LOUIS ALLEN MCDANIEL, JR., *Plaintiff-Appellant,* vs. No. 73-1438 UNIVERSITY OF CHICAGO, and ARGONNE, a Corporation, *Defendants-Appellees.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. (72 C 270)

This matter comes before the Court on the "MOTION FOR FURTHER STAY OF MANDATE," filed herein on June 19, 1975 by counsel for the defendants-appellees. On consideration whereof,

IT IS ORDERED that the mandate of this Court be STAYED to and including July 14, 1975, pursuant to the provisions of Rule 41(b) of the Federal Rules of Appellate Procedure.

APPENDIX F.

UNITED STATES COURT OF APPEALS,
Northern District of Illinois,
Eastern Division.

LOUIS ALLEN MCDANIEL, JR., *Plaintiff,* vs. THE UNIVERSITY OF CHICAGO, a corporation, and ARGONNE, a corporation, *Defendants.*	No. 72 C 270

MEMORANDUM OF DECISION.

PHILIP W. TONE, *District Judge.*

The Bacon-Davis Act requires that on all Government construction contracts in excess of $2,000, laborers and mechanics will be paid at least the wages which the Secretary of Labor determines are "prevailing" for the corresponding classes of laborers and mechanics employed on projects of a similar character in the locality in which the work is to be performed. The Act provides that the contracting officer may withhold from the contractor a sum sufficient to reimburse the laborers and mechanics for any difference between the prevailing wages and the wages they actually receive. If such sums are withheld, the Comptroller-General is empowered to make the reimbursements from the sums withheld. If the funds withheld are insufficient to reimburse the laborers and mechanics in full, they may recover the rest by resorting to "the right of action and/or of intervention against the contractor and his sureties conferred by law upon persons furnishing labor or materials, and in such proceed-

ings it shall be no defense that such laborers and mechanics accepted or agreed to accept less than the required rate of wages or voluntarily made refunds." 40 U. S. C. § 276a-2(b). The statutory scheme also provides a range of penalties which the Government may bring to bear upon a contractor who pays substandard wages, including terminating his contract and blacklisting him.

Plaintiff in this action alleges that he and the class he seeks to represent were employed as laborers or mechanics on a Government construction contract covered by the Act at the Argonne National Laboratory, and that defendants failed to pay them the prevailing wages to which the Secretary of Labor had determined they were entitled. The contracting officer failed to withhold any funds for reimbursement. Plaintiff seeks damages under the Act for himself and the class and, since the provisions of the contract reflected the wage rates required by the Act, he also seeks damages for breach of contract and related claims under state law under this Court's pendent jurisdiction.

The defendant university has moved to dismiss, relying primarily on its contention that the Bacon-Davis Act does not admit of a private right of action under the circumstances alleged in the complaint. Defendant argues that the Act establishes an enforcement scheme in which it is solely up to the Government to institute sanctions against an offending contractor—contract termination, blacklisting, or withholding accrued payments for reimbursement. Only in the limited situation where the Government itself has invoked the statute by actually withholding funds in an amount which proves to be inadequate does the defendant concede that an aggrieved employee may proceed on his own behalf under § 276a-2(b). Furthermore, defendant contends that the right of action referred to there is solely limited to an action on the contractor's bond under the Miller Act, 40 U. S. C. § 270b, to be pursued in the name of the United States.

Defendant's contention that there is no right of action, whether limited to the Miller Act remedy or not, when the contracting officer has failed to withhold accrued payments from the contractor has no warrant in either the language of the statute or its legislative history. Section 276a-2(b) merely says that when the funds withheld "are insufficient," the laborers and mechanics shall have their right of action. That language should be interpreted to produce a rational result. Congress can hardly have intended that the remedy be available if the contracting officer withholds something, but less than the amount needed to reimburse the laborers and mechanics in full, but not if he withholds nothing at all, when some amount is needed for reimbursement. There is no reason to believe that Congress meant to leave it to the contracting officer to decide whether laborers and mechanics could obtain redress for a violation of their rights. On the contrary, there is evidence in the legislative history that Congress intended that aggrieved laborers and mechanics have a right of action when no funds have been withheld. Senator Walsh of Massachusetts described the bill which ultimately became § 276a-2(b) with these words:

> "[It will] provide remedies for laborers and mechanics aggrieved by forced rebate or failure to pay the prevailing rate of wages by allowing such laborers and mechanics to have the same right of action against the contractors and his sureties in court which is now conferred by the bond statute on persons furnishing labor and materials *when there are no funds to withhold for reimbursement.*" At 79 Cong. Rec. 12073 (July 30, 1935). (Emphasis added.)

The more difficult question is whether Congress intended to limit the right of action specified in § 276a-2(b) to an action on the contractor's bond under the Miller Act. I conclude reluctantly that it did so intend. Mindful as I am of the Supreme Court's admonition that "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the Congressional purpose," *J. I. Case Co.* v. *Borak*, 377 U. S.

426 (1964), and mindful that, ironically, if there were no language at all about a private right of action in the Bacon-Davis Act we would be justified in finding an implied right of action where a statutory scheme of remedies depends solely upon the actions of Government officials, *Allen* v. *State Board of Elections,* 393 U. S. 544, 556-57 (1968), there is no way to avoid the thrust of the statute's language and legislative history in delimiting the right of action to one which Congress felt would be adequate to protect employees whose contractors failed to pay them the wages prescribed by the statute. For the language specifies that aggrieved employees shall have *"the* right of action and/or of intervention against the contractor and his sureties conferred by law upon persons furnishing labor or materials. . . ." This language is not only descriptive of the Heard, now Miller, Act, but the choice of initial article lends weight to defendant's conclusion that Congress had only one right of action in mind. This conclusion is buttressed by the portion of Senator Walsh's remarks quoted above which refers to "the bond statute," and by the Senate Report accompanying the legislation, S. Rep. No. 1155, 74th Cong., 1st Sess., 4 (1935), which says:

> "Section 3(b): When the funds withheld for such claimants are insufficient to reimburse all laborers and mechanics aggrieved by breach of the wage stipulations this subsection gives such laborers and mechanics a cause of action on the contractor's bond, pursuant to the provisions of the Hurd [Heard] Act as amended from time to time (act of Aug. 13, 1894, 28 Stat. 278, U. S. C. title 40, sec. 230)."

Accord, Willis v. *E. I. DuPont de Nemours & Co.,* 76 F. Supp. 1010 (D. C. Okla. 1948).

Plaintiff has stated in his memorandum that no bonds were ever filed in this case pursuant to the Miller Act to protect him and his fellow employees against violations of the Bacon-Davis Act, and that they will be left without a remedy unless they are

allowed an ordinary direct action against the contractor pursuant to the Bacon-Davis Act. The parties do not explain, nor can I discern, why, in light of the Miller Act's clear requirements, no bonds were filed. It is possible that plaintiff may have an action against the contractor in the state court. But he has no remedy, nor may this Court's jurisdiction be invoked, under the Bacon-Davis Act. While it is true that in this case giving effect to what I perceive to be the Congressional intention may leave plaintiff without a federal remedy, it appears that these are extraordinary circumstances and that in the ordinary case the statutory scheme of remedies, supplemented by the limited private right of action of § 276a-2(b), will suffice to effectuate the Congressional purpose of protecting employees from substandard earnings, *United States* v. *Binghamton Construction Co.,* 347 U. S. 171, 177 (1964).

Since no cause of action could properly be stated under the Miller Act in the absence of a bond, *Harry F. Ortlip Co. of Pennsylvania* v. *Alvey Ferguson Co.,* 223 F. Supp. 893, 895 (E. D. Pa. 1963), there is no possible way to make out a violation of the Bacon-Davis Act cognizable in a private action under that Act. No purpose would therefore be served by amending the complaint. And in light of our resolution of the issues discussed above, there is no need to consider the class action and statute of limitation issues raised in the motion and supplementary motion to dismiss.

Defendant's motion to dismiss the complaint is granted.

/s/ PHILIP W. TONE,
United States District Judge.

Dated: March 12, 1973.

APPENDIX G.

28 U. S. C. § 1337. Commerce and anti-trust regulations.

The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

40 U. S. C. § 276a. Rate of wages for laborers and mechanics.

(a) The advertised specifications for every contract in excess of $2,000, to which the United States or the District of Columbia is a party, for construction, alteration, and/or repair, including painting and decorating, of public buildings or public works of the United States or the District of Columbia within the geographical limits of the States of the Union, or the District of Columbia, and which requires or involves the employment of mechanics and/or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the city, town, village, or other civil subdivision of the State, in which the work is to be performed, or in the District of Columbia if the work is to be performed there; and every contract based upon these specifications shall contain a stipulation that the contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work, unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at time of payment, computed at wage rates not less than those stated in

the advertised specifications, regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and such laborers and mechanics, and that the scale of wages to be paid shall be posted by the contractor in a prominent and easily accessible place at the site of the work; and the further stipulation that there may be withheld from the contractor so much of accrued payments as may be considered necessary by the contracting officer to pay to laborers and mechanics employed by the contractor or any subcontractor on the work the difference between the rates of wages required by the contract to be paid laborers and mechanics on the work and the rates of wages received by such laborers and mechanics and not refunded to the contractor, subcontractors, or their agents.

(b) As used in sections 276a to 276a—5 of this title the term "wages", "scale of wages", "wage rates", "minimum wages", and "prevailing wages" shall include—

(1) the basic hourly rate of pay; and

(2) the amount of—

(A) the rate of contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a fund, plan, or program; and

(B) the rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing benefits to laborers and mechanics pursuant to an enforcible commitment to carry out a financially responsible plan or program which was communicated in writing to the laborers and mechanics affected,

for medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, for unemployment benefits, life insurance, disability and sickness insurance, or accident insurance for vacation and holiday pay, for defraying costs of apprentice-

ship or other similar programs, or for other bona fide fringe benefits, but only where the contractor or subcontractor is not required by other Federal, State or local law to provide any of such benefits:

Provided, That the obligation of a contractor or subcontractor to make payment in accordance with the prevailing wage determinations of the Secretary of Labor, insofar as sections 276a to 276a—5 of this title and other Acts incorporating sections 276a to 276a—5 of this title by reference are concerned may be discharged by the making of payments in cash, by the making of contributions of a type referred to in paragraph (2)(A), or by the assumption of an enforcible commitment to bear the costs of a plan or program of a type referred to in paragraph (2)(B), or any combination thereof, where the aggregate of any such payments, contributions, and costs is not less than the rate of pay described in paragraph (1) plus the amount referred to in paragraph (2).

In determining the overtime pay to which the laborer or mechanic is entitled under any Federal law, his regular or basic hourly rate of pay (or other alternative rate upon which premium rate of overtime compensation is computed) shall be deemed to be the rate computed under paragraph (1), except that where the amount of payments, contributions, or costs incurred with respect to him exceeds the prevailing wage applicable to him under sections 276a to 276a—5 of this title, such regular or basic hourly rate of pay (or such other alternative rate) shall be arrived at by deducting from the amount of payments, contributions, or costs actually incurred with respect to him, the amount of contributions or costs of the types described in paragraph (2) actually incurred with respect to him, or the amount determined under paragraph (2) but not actually paid, whichever amount is the greater.

40 U. S. C. § 276a-2 Payment of wages by Comptroller General from withheld payments; listing contractors violating contracts

(a) The Comptroller General of the United States is authorized and directed to pay directly to laborers and mechanics from any accrued payments withheld under the terms of the contract any wages found to be due laborers and mechanics pursuant to sections 276a to 276a—5 of this title; and the Comptroller General of the United States is further authorized and is directed to distribute a list to all departments of the Government giving the names of persons or firms whom he has found to have disregarded their obligations to employees and subcontractors. No contract shall be awarded to the persons or firms appearing on this list or to any firm, corporation, partnership, or association in which such persons or firms have an interest until three years have elapsed from the date of publication of the list containing the names of such persons or firms.

(b) If the accrued payments withheld under the terms of the contract, as aforesaid, are insufficient to reimburse all the laborers and mechanics, with respect to whom there has been a failure to pay the wages required pursuant to sections 276a to 276a—5 of this title, such laborers and mechanics shall have the right of action and/or of intervention against the contractor and his sureties conferred by law upon persons furnishing labor or materials, and in such proceedings it shall be no defense that such laborers and mechanics accepted or agreed to accept less than the required rate of wages or voluntarily made refunds.

40 U. S. C. § 270a Bonds of contractors for public buildings or works; waiver of bonds covering contract performed in foreign country

(a) Before any contract, exceeding $2,000 in amount, for the construction, alteration, or repair of any public building or

public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such persons, who is hereinafter designated as "contractor":

(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.

(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. Whenever the total amount payable by the terms of the contract shall be not more than $1,000,000 the said payment bond shall be in a sum of one-half the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $1,000,000 and not more than $5,000,000, the said payment shall be in a sum of 40 per centum of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $5,000,000 the said payment bond shall be in the sum of $2,500,000.

(b) The contracting officer in respect of any contract is authorized to waive the requirement of a performance bond and payment bond for so much of the work under such contract as is to be performed in a foreign country if he finds that it is impracticable for the contractor to furnish such bonds.

(c) Nothing in this section shall be construed to limit the authority of any contracting officer to require a performance bond or other security in addition to those, or in cases other than the cases specified in subsection (a) of this section.

(d) Every performance bond required under this section shall specifically provide coverage for taxes imposed by the United

States which are collected, deducted, or withheld from wages paid by the contractor in carrying out the contract with respect to which such bond is furnished. However, the United States shall give the surety or sureties on such bond written notice, with respect to any such unpaid taxes attributable to any period, within ninety days after the date when such contractor files a return for such period, except that no such notice shall be given more than one hundred and eighty days from the date when a return for the period was required to be filed under the Internal Revenue Code of 1954. No suit on such bond for such taxes shall be commenced by the United States unless notice is given as provided in the preceding sentence, and no such suit shall be commenced after the expiration of one year after the day on which such notice is given.